

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOUGLAS N. GAER, individually and on )  
behalf of all others similarly situated, )  
Plaintiff, )  
vs. ) Civil Action No. 10-1061  
EDUCATION MANAGEMENT CORP., )  
et al., )  
Defendants. )

O R D E R

On August 11, 2010, Plaintiff Douglas N. Gaer, individually and on behalf of all others similarly situated, filed a complaint (ECF No. 1) under the Securities Act of 1933 for the benefit of those individuals who purchased the common stock of Education Management Corp. (“EDMC”) in an initial public offering completed on October 1, 2009, and also under the Securities Exchange Act of 1934 for the benefit of those individuals who purchased EDMC common stock in the IPO or on the open market from October 1, 2009 through and including August 13, 2010. On January 10, 2011, an Amended Complaint (ECF No. 56) was filed by lead plaintiff Oklahoma Police Pension and Retirement System and newly-added plaintiff Southeastern Pennsylvania Transportation Authority. Named as defendants are EDMC and certain individuals associated with EDMC, namely Adrian M. Jones, Randall J. Killeen, Jeffrey T. Leeds, John R. McKernan, Jr., Leo F. Mullin, Todd S. Nelson, Paul J. Salem, Edward H. West, and Peter O. Wilde (together, “EDMC & the Individual Defendants”). In addition, the Amended Complaint names thirteen investment banks that acted as underwriters of the October 2009 IPO, namely Barclays Capital, Inc., Barrington Research Associates, BMO Capital Markets

Corp., Credit Suisse Securities (USA) LLC, Goldman, Sachs & Co., J.P. Morgan Securities, Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., Morgan Stanley & Co., Piper Jaffray & Co., Robert W. Baird & Co., Signal Hill Capital Group, LLC, Stifel, Nicolaus & Co., Inc., and William Blair & Co., LLC (together, the “Underwriter Defendants”).

On March 28, 2011, motions to dismiss were filed by EDMC & the Individual Defendants (ECF No. 74) and by the Underwriter Defendants (ECF No. 71). On August 30, 2011, Magistrate Judge Mitchell filed a Report and Recommendation (ECF No. 93) (“R&R”), recommending that the motions be granted. Plaintiffs filed objections on September 16, 2011 (ECF No. 94), to which Defendants responded on September 21, 2011 (ECF Nos. 95, 96).

It is noted that, in their objections, Plaintiffs indicate that they “do not object to the portions of the R&R recommending dismissal of claims under the Securities Act of 1933 based on the Department of Education’s negotiated rulemaking, R&R at 36-42, or concerning the related party transaction, *id.* at 42-44.” (ECF No. 94 at 1 n.2.) Thus, Plaintiffs have not objected to the dismissal of some portions of the complaint.

Plaintiffs object to the R&R to the extent that it recommends dismissal of the portions of the Amended Complaint alleging that EDMC failed to reveal in its Prospectus and Registration Statement that its growth was the result of widespread recruiting practices that violated Title IV of the Higher Education Act of 1965. Plaintiffs’ primary objection is that the R&R failed to give any weight to the allegations made in a False Claims Act case that was filed in 2007 (Civ. A. No. 07-461), in which the Department of Justice intervened in May 2011. Plaintiffs also would have the Court take judicial notice of the Joint Complaint in Intervention filed in that case by the United States and the states of California, Florida, Illinois and Indiana on August 8, 2011.

Magistrate Judge Mitchell explained why it was not appropriate for the Court to give

weight to the allegations in the qui tam case or the fact that the government had elected to join it. (R&R at 17 & n.12.) Although Plaintiffs have now cited several district court cases that concluded there is “nothing improper about utilizing information contained in an SEC complaint as evidence to support private claims under the PSLRA,” SEC v. Lee, 720 F. Supp. 2d 305, 341 (S.D.N.Y. 2010), the Court observes that these cases cite one another and are not persuasive.

Plaintiffs lodge numerous other objections against the R&R and Defendants have responded to all of them. Having reviewed the R&R, the objections, the responses thereto and the record de novo, the Court concludes that the objections do not demonstrate that the conclusions reached by the R&R should be rejected.

AND NOW, this 29<sup>th</sup> day of September, 2011,

IT IS HEREBY ORDERED that the motion to dismiss the Amended Complaint filed by Defendants Barclays Capital, Inc., Barrington Research Associates, BMO Capital Markets Corp., Credit Suisse Securities (USA) LLC, Goldman, Sachs & Co., J.P. Morgan Securities, Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., Morgan Stanley & Co., Piper Jaffray & Co., Robert W. Baird & Co., Signal Hill Capital Group, LLC, Stifel, Nicolaus & Co., Inc., and William Blair & Co., LLC (Docket No. 71) is granted.

IT IS FURTHER ORDERED that the motion to dismiss the Amended Complaint filed by Defendants Education Management Corp., Adrian M. Jones, Randall J. Killeen, Jeffrey T. Leeds, John R. McKernan, Jr., Leo F. Mullin, Todd S. Nelson, Paul J. Salem, Edward H. West, and Peter O. Wilde (Docket No. 74) is granted.

Nora Barry Fischen  
Nora Barry Fischer  
United States District Judge